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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 774

COUNTY OF ALLEGHENY,

Petitioner,

vs.

MARYLAND CASUALTY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, respectfully represents:

Statement of the Matter Involved.

[References such as (R. b), (R. 9), (R. 1806), etc., are to pages of the printed Appendix for Appellant below. References such as (R. 45a), (R. 50a), etc., are to pages of the printed Appendix for Appellee below, as supplemented by the additional proceedings below.]

(1)

In an action laid on a $200,000 surety bond (R. 9) and tried by a jury in the United States District Court for the Western District of Pennsylvania, petitioner recovered a verdict and judgment (R. 1806) against respondent for $251,266.67, the full amount of the bond with interest. Thereafter, respondent moved (R. 2153) under Civil Procedure Rules 50 and 59 for a judgment and, in the alternative, for a new trial. The trial court (R. 2166) thereupon vacated petitioner's verdict and entered judgment for respondent, but it failed to act upon respondent's alternative motion for new trial. Calling the decision of this Court in *Montgomery Ward* v. *Duncan,* 311 U. S. 243 (1940) to its attention, petitioner then moved the trial court (R. 2166) to vacate its judgment and to proceed to make complete disposition of respondent's entire motion. The trial court thereupon (R. 2173) vacated its judgment. Subsequently, by the entry of separate orders (R. 2176-7), both dated November 15, 1941, the trial court re-entered judgment against petitioner and also granted respondent's alternative motion for new trial.

Petitioner appealed (R. 2181) to the United States Circuit Court of Appeals for the Third Circuit from the final judgment so entered against it. The Circuit Court avoided decision on the merits of the appeal by holding (R. 49a), purely *suo moto,* that the grant of the motion for new trial, alternative to the motion for judgment, had operated in law to vacate the simultaneously entered judgment because the trial court had not expressly conditioned the grant to be effective only upon a reversal of the judgment on appeal. Thus concluding the appealed judgment to be non-existent, the Circuit Court dismissed petitioner's appeal (R. 54a).

Petitioner avers that, as a matter of law, such conditional effectiveness of the grant was implicit in the order of the

trial court and was not required to be expressly stated. Petitioner, therefore, avers existence of the appealed judgment and assigns the dismissal of its appeal as error. By reason of other facts hereinafter stated, petitioner avers that the record in this action is such that a consideration of the merits of its appeal either by the Circuit Court or by this Court could and should properly result in a restoration of its verdict and judgment as free from harmful error and as constituting a legally correct final determination of the rights of the parties on the issues joined.

(2)

In its notice of appeal (R. 2181), petitioner specifically designated the final judgment as the order appealed from and then gave further notice that, "in this appeal from said final judgment", it would also seek a review and reversal of the order granting the new trial, which, as has been stated, was an order in grant of respondent's alternative motion. Petitioner avers that said further notice did not constitute an appeal from said order but was merely an assertion of an intended claim of procedural right with respect thereto. In its statement of points intended to be relied upon (filed under Civil Procedure Rule 75(d)), petitioner stated a point (R. 2182) to the effect that, if the judgment appealed from were found to be error, the grant of new trial in the alternative was *reviewable* because its underlying grounds were solely matters of law. In immediately subsequent points (R. 2183), petitioner attacked each reason separately as constituting an abuse of judicial discretion and stated supporting detail. The reasons will be hereinafter analyzed and explained in their relation to the facts of the case.

Prior to a hearing of petitioner's appeal, respondent moved (R. 43a) the Circuit Court "to dismiss that part of the appeal herein seeking a review, etc." upon the ground

that the order "granting a new trial" was not a final decision within the statutory jurisdiction of the Circuit Court and was "not appealable". In answer (R. 45a) to the motion, petitioner contended that it had not *appealed* from any order granting a new trial but merely sought a review of the order below granting respondent's alternative motion as properly incidental to a determination of the character of mandate appropriately issuable by the Circuit Court in the event it reversed the appealed judgment after hearing the appeal. By an order (R. 47a) entered June 2, 1942, unsupported by any opinion, the Circuit Court granted respondent's said motion. Petitioner avers that said order was and is an absolute nullity in law and without any force or effect whatsoever in this action, for the reason that it purports to dismiss an appeal which in fact never existed and does not exist.

The final order of the Circuit Court, entered on January 22, 1943, (R. 54a) ordered and adjudged "that the appeal from the orders of November 15, 1941, of the said District Court in this case be, and the same is hereby dismissed, with costs". It will be noted from the language of said final order that it dismiss petitioner's appeal as one from the "orders" of the trial court dated November 15, 1941, and not as one solely from the order of that date which entered the judgment actually appealed from. Insofar as said final order purports to dismiss an appeal by petitioner from the order of November 15, 1941, in grant of respondent's alternative motion for new trial, petitioner assigns error thereto upon the ground that no such appeal exists in fact in this case.

Petitioner avers that it was under no duty to petition this Court for certiorari for a review of the order of the Circuit Court dated June 2, 1942. Any such application made prior to a final decision of petitioner's appeal by the Circuit Court could have called for nothing more than an advisory

opinion of this Court based upon a mere conjecture that the appeal might result in a reversal of the appealed judgment by the Circuit Court. The entry by the Circuit Court of its final order of January 22, 1943, in form and substance as above stated, relieves this situation and makes appropriate the review thereof now sought by this petition.

Petitioner avers that, if this Court grants certiorari upon this petition, this Court has adequate power to declare the ineffectiveness of both of said orders in the circumstances. Petitioner further avers that, if a consideration of the merits of its appeal either by this Court or by the Circuit Court results in a reversal of the judgment appealed from, it will become the duty of the court under the law to review the grant by the trial court of respondent's alternative motion for new trial, in the peculiar circumstances of its underlying reasons, as in determination of the character of its appropriate mandate.

(3)

Respondent's bond (R. 9) was conditioned for faithful performance of a contract of sale (R. 12) of 1100 voting machines purchased by petitioner from respondent's principal, Poole Engineering & Machine Company, at a total price of $1,120,900, which was paid in full by petitioner. By its complaint (R. 3), petitioner alleged three different varieties of breach of performance of the sales contract: (1) breach of an implied warranty of fitness for purpose; (2) breach of certain express warranties that the machines would be constructed so as to permit the performance of certain acts and to preclude performance of certain other acts; and (3) breach of a particular promise (designated hereinafter for convenience as the "5-year promise") which required the vendor (R. 13, paragraph "Fourth") "to make such alterations, repairs, replacements, etc., in accordance with the specifications", Article 12 (R. 23) of which required the vendor to "make good by repair or

replacement, any imperfections or defects in the material, mechanism or workmanship in any and all machines purchased" for a period of five years without cost to petitioner.

By a schedule (R. 26) attached to the complaint, petitioner (1) specified the breached express warranties and (2) particularized the imperfections and defects in the material, mechanism and workmanship subject to the performance of the "5-year promise",—these same defects being there alleged as the underlying factors in causation of the alleged breaches of warranties. Petitioner further alleged (R. 5) these particularized defects to have been latent and undiscoverable by plaintiff when the machines were delivered, accepted, and paid for, and to have become known to petitioner only in course of time thereafter by and through their use.

The same identical damages were claimed (R. 7) as consequential to each of the three alleged varieties of breaches of performance of the sales contract. Otherwise stated, petitioner claimed to have been damaged by breach of the condition of the bond in a single sum as consequential to any one of the three alleged breaches of performance of the sales contract or as consequential to all of them together.

The verdict established proof of damages to the full amount of the bond in consequence of breaches of performance of the sales contract as regards the implied warranty and the express warranties. If the proper scope of the "5-year promise" is determined to be as contended for by petitioner and not as limited by the trial court (a matter hereinafter explained), the verdict establishes proof of damages to the full amount of the bond in consequence of breach of this promise also.

To the branches of petitioner's claim based upon alleged non-performance by respondent's principal of its contractual warranties, expressed and implied, respondent raised an affirmative defense of *res judicata,* to which peti-

tioner replied by order (R. 78) of the trial court. The issues raised by the complaint, this affirmative defense (R. 64), and the reply thereto (R. 79), were issues of fact and of law. The case relied upon by respondent as rendering said branches of petitioner's claim *res judicata* was *Bassett* v. *Armstrong,* 309 Pa. 296. The record in said case (R. 1917-2150) was admitted in evidence over petitioner's objection (R. 1754-6 and R. 1784) and went to the jury along with all of the other evidence in the case when the trial court refused respondent's request for charge to the effect that it barred a recovery by petitioner as respects said branches of its claim (R. 1795 and R. 1804). Disregarding the verdict as a finding for petitioner upon the issues of fact involved in the *res judicata* defense, the trial court changed its mind upon the matter involved in the refusal of the request and entered the judgment appealed from upon a determination (R. 2154) that, as a matter of law, said branches of plaintiff's claim were *res judicata* by said case. In its statement of points relied upon in its appeal, petitioner assigned said action of the trial court as reversible error (R. 2182).

Petitioner's evidence going to the branch of its claim relating to breach of performance of the "5-year promise" was offered and received in conjunction with the evidence relating to the other branches of its claim (see typical offer, R. 381-3). Said evidence went to the jury under a charge (R. 1785, R. 1795-6) construing the "5-year promise" to be limited to maintenance of the machines in their original condition as delivered. Petitioner excepted specially to the charge in said respect (R. 1800). In stating the measure of damages occasioned by such breaches of its "obligations under the contract" as the jury should find Poole had committed, the trial court (R. 1792) charged the jury that if it found for petitioner it should determine the amount petitioner "was fairly required to pay, not to reconstruct new machines, but to repair and recondition the

old machines so that they would meet the requirements of the sales contract, with its specifications". The verdict (R. 1806) was a general one. In entering the judgment for respondent after the verdict, the trial court concluded (R. 2163-4) that the testimony contained no evidence of "expense to the county for the restoration or repair of any ailing part" and, construing the obligation of Poole under its contract to be limited to the "repair" or "replacement" of original parts in the original machines, it found respondent entitled to judgment insofar as petitioner's claim of breach in performance of the sales contract in the respect now being discussed was concerned. No request for binding instructions upon this specific ground had been made or presented prior to the receipt of the verdict. In its statement of points relied upon in its appeal, petitioner assigned said action of the trial court as reversible error (R. 2182). Petitioner avers that the "5-year promise", properly construed under the law, required the vendor to make good, by alterations, repairs, and replacements, any imperfections or defects in the material, mechanism, or workmanship that developed in the machines within a period of five years from the date of their purchase.

The reasons expressly stated by the trial court in its opinion supporting its grant of respondent's alternative motion for a new trial (R. 2174) were substantially as follows:

> (1) That, as one rendered in respect of the branches of petitioner's claim of non-performance of the express and implied warranties, the verdict is against the law,—this by reason of supposed error in the refusal of respondent's request for charge that the claim in those respects was *res judicata* by *Bassett vs. Armstrong.*
>
> (2) That, as one rendered in respect of the branch of petitioner's claim of non-performance of the "5-year

promise", the verdict is against the evidence. This conclusion, however, is expressly made dependent and conditional upon the rectitude of the opinions (R. 2163-4, R. 2172, R. 2174) and the charge of the trial court respecting the scope of the promise. And the effectiveness of the entire reason is also expressly conditional upon the supposition of rectitude in the conclusion that the branches of petitioner's claim relating to the express and implied warranties are *res judicata* by *Bassett vs. Armstrong.*

(3) That "certain testimony" admitted in evidence could have no probative value upon the issues of breach of contract because the same evidence could support a conviction for violation of certain criminal sections of the Pennsylvania Voting Machine Act of 1929, P. L. 549, and "in this same connection" the trial court had refused respondent's requests No. 17 (R. 1805), No. 18 (R. 1805), and No. 19 (R. 1796); the last of which, however, it had not refused but had affirmed and read into the charge (R. 1796).

The first two of said reasons are substantially the same reasons upon which the trial court entered the judgment appealed from, and the third reason is purely a matter of law. Petitioner avers that all of said reasons are merely judicially supposed trial errors and that petitioner's verdict and judgment are totally free of any actual trial error harmful to respondent.

At the conclusion of all the evidence, respondent submitted a number of writen requests for jury instructions, among which was a request that respondent "is entitled to have a verdict directed in its favor, dismissing the complaint" (R. 1805). This request was refused (R. 1798). Neither before nor during the submission of the case to the jury did the trial court make any express reservation of any question as to the legal sufficiency of the evidence to support a verdict for petitioner. Nor did respondent move

for a directed verdict stating "the specific grounds therefor" under the provisions of Civil Procedure Rule 50 (a). After rendition of the verdict, respondent filed its motion (R. 2113) wherein, after reciting that "a motion for a directed verdict made by the defendant at the conclusion of all the evidence having been denied," respondent "pursuant to Rule 50 of the Federal Rules of Civil Procedure," moved "to have the aforementioned verdict and the judgment entered thereon set aside, and to have a judgment entered in accordance with its said motion for a directed verdict." With the record in this state, the trial court entered the judgment appealed from. In its statement of points relied upon in its appeal, petitioner asserted the entry of the judgment under these circumstances to have been in violation of petitioner's rights under the Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States, and, hence, reversible error (R. 2184).

In its brief in support of its appeal to the Circuit Court, petitioner stated and argued the following questions:

> (1) Are the branches of petitioner's claim based upon non-performance by respondent's principal of its contractual warranties expressed and implied *res judicata* as a matter of law notwithstanding the verdict as one rendered in respect thereof?
>
> (2) Is the verdict without legally sufficient support as one rendered in respect of the branch of petitioner's claim based upon non-performance by respondent's principal of its contractual "5-year promise"?
>
> (3) If the appealed judgment is reversed, has the Court the power, in determination of the appropriate nature of its mandate, to review the alternative award of new trial in the peculiar circumstances of this case? If so, does the award constitute an abuse of judicial

discretion in the circumstances of its underlying reasons?

(4) Was the appealed judgment entered in violation of petitioner's rights under the Seventh Amendment to the Constitution of the United States and the Federal Rules of Civil Procedure?

Petitioner avers that, if this Court grants certiorari upon this petition, this Court has adequate power and authority under the law to determine all of said questions or to order them to be determined by the Circuit Court below.

(4)

By its amended complaint in the District Court and appropriate process (R. b), petitioner brought upon the record an added party defendant, Home Indemnity Company, against whom a claim for relief (R. 9) was stated upon an additional $425,000 bond (R. 1831) upon which it is surety and which is conditioned in certain respects concerning the same voting machines and the same contract of sale. Petitioner averred damages greater than the combined amounts of the two bonds and sought relief against Home Indemnity Company on its bond in the event of a successful recovery to the full extent of respondent's bond. However, the count against Home Indemnity Company was dismissed by the District Court without prejudice to the right of petitioner to bring another action against Home Indemnity Company upon its bond after a recovery from respondent of the full amount of respondent's bond by payment or judgment (R. c).

Petitioner, being a component part of the public, accordingly avers that it is peculiarly in the public interest that the litigation in the instant case be determined with all possible speed consistent with the procedural rights of respondent and the law.

Jurisdictional Statement.

(1) Petitioner bases the jurisdiction of this Court to entertain and grant this petition upon the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. § 347.

(2) The Circuit Court below dismissed petitioner's appeal on January 22, 1943.

Questions Presented.

The questions intended to be presented by this petition are the following:

(1) Did the trial court's order of November 15, 1941, in grant of respondent's alternative motion for new trial operate in law to vacate the judgment entered by its other order of the same date?

(2) Did petitioner appeal from both orders of the trial court dated November 15, 1941? Did not petitioner, rather, appeal solely from the order for judgment and, as to the order for new trial, merely assert a procedural right to a conditional review thereof as incidental to the appropriate character of mandate issuable in the event of a reversal of the appealed judgment?

(3) When, after a verdict for plaintiff, defendant moves under Civil Procedure Rule 50 (b) for a judgment and, in the alternative, for a new trial, and the trial court enters judgment pursuant thereto and also grants the alternative motion for new trial for reasons which plaintiff desires to allege are merely supposed but not actual trial errors, does plaintiff, in an appeal from the judgment, have a procedural right to a conditional review of the grant of new trial as incidental to the appropriate character of mandate issuable in the event of a reversal of the appealed judgment?

(4) Assuming Question (3) to be answered in the affirmative, is not such plaintiff entitled to restoration of his verdict if, upon a review of the reasons underlying the grant of new trial as well as any alleged trial errors cross-assigned by the defendant, the appellate court decides the verdict to have been free from actual trial error harmful to defendant?

(5) Should the Court order full hearing and argument in this Court upon the merits of petitioner's appeal?

Reasons Relied Upon.

Petitioner relies upon the following reasons for the allowance of certiorari:

(1) The decision of the Circuit Court below to the effect that the appealed judgment does not exist is probably in conflict with the decision of this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, in exposition and construction of Rule 50 (b) of the Federal Rules of Civil Procedure.

(2) In deciding that petitioner had appealed from both orders of the trial court dated November 15, 1941, rather than only from the order for judgment with an assertion of a procedural right to an incidental review of the grant of respondent's alternative motion for new trial in the event of a reversal of the appealed judgment, the Circuit Court below decided an important question of Federal law in construction of Civil Procedure Rules 73 (a), 73 (b) and 75 (d), which has not been, but should be, decided in this Court.

(3) By its decision dismissing petitioner's appeal without deciding the merits of any of the questions therein involved, the Circuit Court below so far departed from the accepted and usual course of judicial proceedings in the cir-

cumstances of the appeal as to call for an exercise of this Court's power of supervision.

(4) Questions (3) and (4), as presented above, are of such importance to the public and to the profession as to call for their determination by this Court.

WHEREFORE, petitioner respectfully prays the Court to grant a review, on writ of certiorari, of the decision of the United States Circuit Court of Appeals for the Third Circuit in said case, being the case of County of Allegheny, Appellant, vs. Maryland Casualty Company, at No. 7962 in said court; and, further, to order full hearing and argument upon the merits of the questions involved in said appeal to the end that this litigation may be finally determined in this Court by such judgment as to right and justice may appertain; and for such other and further relief as the Court may deem meet and proper in the circumstances.

And petitioner will ever pray, etc.

COUNTY OF ALLEGHENY,
Petitioner,

By EDWARD G. BOTHWELL,
Attorney for Petitioner.

WALTER P. SMART,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Official Reports of Opinions Below.

District Court:

Opinion in Support of Dismissal of Count against Home Indemnity Co ..... 32 F. Supp. 297
Opnion in Support of Judgment n. o. v. 42 F. Supp. 672
Opinion in Support of Order Granting Petitioner's Motion for Simultaneous Disposition of Both Branches of Respondent's Motion under Rule 50(b) 42 F. Supp. 677
Opinion in Support of Grant of Alternative Motion for New Trial ..... 42 F. Supp. 678

Circuit Court:

Opinion in Support of Dismissal of Petitioner's Appeal 132 F. 2d ——

Jurisdictional Statement and Statement of the Case.

These statements are made in the petition as required by the applicable rule of court.

Summary of Argument.

The decision of the Circuit Court below deprived petitioner of its procedural rights. Petitioner is entitled to a decision on the merits of its appeal to that Court.

The appealed judgment n.o.v. was not automatically vacated by the alternative new trial grant. Petitioner did not appeal from the new trial grant. In its appeal from the judgment n.o.v., petitioner is entitled to a review of its allegation that the new trial grant was based solely upon incorrect reasons of law, in the event the entry of the judgment n.o.v. is found erroneous.

Under the purpose, operative effect, and permissible scope of Civil Procedure Rule 50(b), as already expounded,

or actually intended if not yet clearly decided, petitioner is entitled to a restoration of its verdict and judgment if, upon a review of the appealed judgment n.o.v. and of the challenged reasons of law which allegedly constitute the sole support of the alternative grant of new trial, as well as of any trial errors asserted by respondent, the reviewing court concludes the verdict to find support in the evidence and the trial to be otherwise free from trial error harmful to respondent.

The case is presently susceptible of final determination, and the circumstances are such as to justify a full hearing upon the merits of the appeal by this Court in exercise of its prerogative in that regard.

Argument.

(1) We contend that the grant of the alternative motion for new trial was not required to be expressly conditioned to become effective only upon reversal of the judgment on appeal. Such a condition is implied by law. We believe this to be the clear implication of the opinion of this Court in *Montgomery Ward & Co.* vs. *Duncan*, 311 U. S. 243, and that the Circuit Court went far astray in its conclusion to the contrary.

None of the cases cited in the opinion of the Circuit Court is in point. Procedure in state courts is in no wise here involved. Nor are federal decisions made prior to the promulgation of the Rules of Civil Procedure. The Pennsylvania cases cited are particularly inapplicable. They either relate to the effect of a grant of new trial upon a judgment entered on a verdict or deal with the construction of the Pennsylvania judgment n.o.v. act. The question here concerns the effect intended by this Court to be given the grant of an alternative motion for a new trial when such a grant is made at the same time a judgment is entered

under Rule 50(b). We believe that the *Montgomery Ward* case sufficiently discloses the intention of this Court to be that such a grant has no effect whatsoever except upon a reversal of the judgment.

We contend, therefore, that the decision of the Circuit Court decided a federal question in a way probably in conflict with an applicable decision of this Court and that certiorari should be granted.

(2) Civil Procedure Rule 73(a) prescribes the manner in which an appeal is to be taken. Rule 73(b) requires the notice of appeal to designate the judgment o part thereof appealed from. Rule 75(d) requires a statement of points relied upon,—a *quasi* assignment of asserted errors.

Petitioner's notice of appeal designates the final judgment of November 15, 1941, as the judgment appealed from. There is no designation of the new trial order as a judgment appealed from. The reference thereto is merely a statement of an asserted claim of a procedural right to a review thereof in the appeal from the final judgment,—a mere advance notice that petitioner's statement of points relied upon would, as they did, raise the question of its reviewability in event of a reversal of the appealed judgment. Perhaps the statement was unnecessary surplusage. But it did no harm to respondent or to anyone else, including both trial and appellate courts. And it did not constitute an appeal from the new trial order and was obviously not intended as such.

The Circuit Court was in error when, by its final order of January 22, 1943, it dismissed an appeal by petitioner from the new trial order, for the simple and plain reason that no such appeal was before it. And it was equally in error when it entered its order of June 2, 1942, for the equally simple and plain reason that the question of the reviewability of the new trial order was not then before it

and could not be reached unless and until it reversed the appealed final judgment.

The inference is legitimate and fair that when the Court entered its order of June 2, 1942, it then and there determined upon the course later pursued when, on January 22, 1943, it held the appealed judgment to be non-existent by reason of the new trial order. If the Court is right in that conclusion, the entry of the order of June 2, 1942, is inconsequential. But if the Court is wrong in that conclusion, its final order of January 22, 1943, as in dismissal of an appeal from the new trial order, becomes decidedly consequential. The question then is what petitioner intended by its "further notice". Does it constitute an appeal from an order for new trial and, hence, not within the statutory jurisdiction of the Circuit Court? Or does it constitute merely what we contend it to be?

In deciding, as it did by this final order of January 22, 1943, that this "further notice" constituted an appeal, the Circuit Court decided a question of federal law which has not been, but should be, decided by this Court.

(3) From what this Court said in the *Montgomery Ward* case in explanation of the purpose of Civil Procedure Rule 50(b) and the proper scope of its administration by the courts, we contend that this Court intends the rule to make an order for new trial effective only upon a reversal of a judgment therewith entered and *also only* upon a determination of the rectitude of the new trial order if it was granted solely for asserted trial errors. Otherwise, the rule would not serve its announced purpose "of speeding litigation and preventing unnecessary retrials", nor would the courts be administering the rule so as "to accomplish all that is permissible under its terms" in obedience to this Court's admonition.

In the cited case, this Court carefully distinguished new trial reasons appealing to the discretion of the trial judge

from those asserting errors committed at trial. Reasons falling within the first category represent decisions of fact which are peculiarly for the trial court and, under the fundamental principle relating to decisions on matters of fact by a court of first instance, they must stand unless, upon extrinsic grounds, they are clearly in abuse of judicial discretion. On the other hand, reasons asserting trial errors are matters of law as to which no judicial discretion exists, and they may not stand unless they are legally correct.

In the cited case, this Court expressly determined it to be the duty of the trial court to rule upon both branches of a motion under Rule 50 (b) and to state its reasons underlying any grant of the new trial branch of the motion. Why the latter specific direction? Obviously, to inform the party against whom the new trial was ordered of the nature of the reasons for the grant and thus enable him to decide upon his future course of procedure. If they, or any of them, were discretionary in character, that would be the end of the matter. If they were solely asserted trial errors, however, the situation would call for an examination into the legal rectitude of the reasons and such further procedure as might be available for any desired determination thereof.

The party in the situation last described then turns to what this Court said in the *Montgomery Ward* case at p. 254:

> "Should the trial judge enter judgment n. o. v. and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for new trial would not *ordinarily* be *reviewable,* and only his action in entering judgment would be ground of *appeal.*" [Italics ours.]

This seems to fit his situation exactly. He assumes that the Court used advisedly and with intentional exactitude the words we have italicized. His is not the ordinary case where the reasons for the grant are, in part at least, dis-

cretionary in character. His is the rare and extraordinary case where the reasons are solely asserted trial errors,—matters of law. He notes the Court's citation of the leading authority on the subject, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 475. He concludes that the Court had that case in mind in using the word "ordinarily", because, although at p. 478 of its opinion in that case the Court said that the rule precluding a review of a grant of new trial for *error of fact* was settled by a long and unbroken line of decisions, the Court also said at p. 482 of the same opinion that under certain circumstances the appellate court *may inquire* into the action of the trial court on a motion for new trial. Consequently, coming to the conclusion that the judicially supposed trial errors are not such in truth and fact, he takes the above quoted language of this Court as his authority to appeal from the judgment and to seek a review therein of the legal questions involved in the new trial grant in the event the appellate court reverses the appealed judgment.

Then, when he reads the concluding sentence of the paragraph containing the above quotation from the *Montgomery Ward* case, viz., "If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial", he may be puzzled at first, but he concludes that the sentence must be read in the light of the entire paragraph of which it is a part and that, accordingly, this Court intended the word "ordinarily" to be read into it.

Petitioner's appeal was thus framed. We believe that this Court intends Rule 50 (b) to have such operative effect in its administration as to make possible a determination in a single appeal of all legal questions germane to a verdict and the judgment thereon. An appeal from the judgment n. o. v. satisfies the requirements of Judicial Code, §128 (a), 28 U. S. C. A. §225 (a). The question involved in a consideration of the appealed judgment goes right back

to the trial itself in determination of whether a case was made out and thus actually concerns the rectitude of the verdict and the judgment thereon. Asserted trial errors are likewise germane to the rectitude of the same verdict and judgment. In a proper case, all of these legal questions should be reviewable and determinable in a single appeal. The day of *Jarndyce and Jarndyce* is happily long since past. Enlightened and expeditious procedure is the goal of the Federal Rules.

Civil Procedure Rule 61 prohibits a trial court from interfering with a jury's verdict unless substantial justice requires it. How is this prohibition to be enforced in a case such as that at bar except by construing the operative effect of Rule 50 (b) in the manner for which we contend? When a trial court enters a judgment n. o. v. under that rule and also grants a new trial for asserted trial errors, it should know that its new trial order cannot become effective unless and until its judgment n. o. v. is reversed and its determination of the legal questions underlying the new trial grant have been found correct upon challenge. Certainly it should know better than to grant the new trial for the same reasons of law upon which it entered the judgment n. o. v., as the trial court did in the instant case, at least in large part.

Petitioner's appeal was entitled to a complete adjudication by the Circuit Court in its circumstances. Certiorari should be granted in the exercise of this Court's power of supervision, and petitioner's Question (3) should be determined by this Court.

(4) In the *Montgomery Ward* case this Court suggested and approved a cross-assignment of trial rulings by an appellee in an appellant's appeal,—this for the purpose of reaching and nullifying a judgment on a verdict if the appellate court reverses a judgment n. o. v. entered under

Rule 50 (b). Such a suggestion, though novel, is obviously in line with the Court's announced purpose in its promulgation of the rule and the manner in which the courts are admonished to administer it so as to accomplish all that is permissible under its terms. It speeds litigation and avoids unnecessary retrials and appeals.

If an appellee, in an appellant's appeal, may thus cross-assign trial rulings which he asserts *nullify* the judgment on the verdict, surely the appellant, in his own appeal, should have the same right to assign trial rulings which he asserts *justify* the judgment on the verdict. We believe, as we have hereinbefore argued, that he has and that this Court so intends. Indeed, his appeal itself is nothing else at its roots than an assertion that the trial ruling which refused his opponent's motion for a directed verdict was correct.

We plant ourselves firmly upon the truism that no man is entitled to more than one legally correct trial. We think that a determination of whether he has had it or not is the real objective of Rule 50 (b) and the permissible appeal from the trial court's entry of a judgment n. o. v. under that rule. It is the legal rectitude of the verdict that is the ultimate subject of inquiry. Consequently, our thesis is that a plaintiff having a verdict is entitled to its restoration if the appellate court, after a review of all trial rulings brought to its attention by both parties in an appeal from a judgment n. o. v. entered under Rule 50 (b), decides the verdict to find sufficient support in the evidence and to be free from trial error harmful to defendant. Petitioner's Question (4) should be determined by this Court upon certiorari.

(5) We well realize that petitioner has no absolute right to a full hearing and argument in this Court upon the merits of its appeal. But we know that this Court has a right

to make such an order if it so desires. In posing Question (5), therefore, petitioner simply asks the Court to determine whether, in the circumstances stated in the petition, it should exercise its right.

We submit that, upon the record, petitioner has been dealt a continuous course of injustice by the courts below since its verdict was returned. The Circuit Court below is obviously not in sympathy with this Court's exposition of the purpose, operative effect, and permissible scope of Rule 50 (b). It would be hard to prophesy the extent of further proceedings unless this Court exercises its prerogative to decide the whole case upon its merits. The state of the case is such as to make it susceptible of final determination here. The existence of petitioner's potential claim upon the Home Indemnity Company additional bond and the public character of petitioner's entity make it peculiarly in the public interest that this litigation be speedily determined. Although the record is necessarily voluminous, the ultimate questions are not difficult and should be settled without further delay. Justice delayed is justice denied.

We express, therefore, the hope than the Court will give special consideration to the prayer of the petition in this regard.

Respectfully submitted,

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(24)

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 774.

COUNTY OF ALLEGHENY,
Petitioner,

v.

MARYLAND CASUALTY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 774.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This is an action by the County of Allegheny, Commonwealth of Pennsylvania, Petitioner herein, against Maryland Casualty Company, herein called "Maryland", on a bond executed by Maryland as surety and Poole Engineering & Machine Company as principal, with respect to the performance by Poole of a contract dated March 26, 1931 with the Petitioner for the delivery of 1100 voting machines.

The action was commenced on March 23, 1937 in the Court of Common Pleas of Allegheny County, and was removed to the United States District Court for the Western District of Pennsylvania on April 13, 1937. On July 28, 1939, Petitioner filed its amended complaint (R. 3) to which Maryland filed its amended answer on December 21, 1939 (R. 62), and Petitioner filed a reply thereto on April 30, 1940 (R. 79).

The action was tried before Honorable Robert M. Gibson, District Judge, and a jury. The trial commenced May 5, 1941, and on May 31, 1941 the jury brought in a

verdict for Petitioner in the amount of $251,266.67, the amount of the bond with interest. The Court entered judgment thereon on May 31, 1941 (R. 1806). On June 9, 1941, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, Maryland made a motion to have the aforesaid verdict and the judgment entered thereon set aside and to have judgment entered in accordance with Maryland's motion for a directed verdict. There was joined with this motion for judgment a motion in the alternative for a new trial (R. 2153). On October 28, 1941, the District Court, by Gibson, D.J., entered an order vacating and setting aside the verdict and entering judgment for Maryland and against Petitioner (R. 2166) with an opinion filed the same day sur the motion (R. 2154), reported in 42 Fed. Supp. 672.

On November 14, 1941, on motion of Petitioner, said order of October 28, 1941 was vacated pending disposition of Maryland's motion for a new trial, on the ground that under *Montgomery Ward & Company* v. *Duncan,* 311 U. S. 243, such procedure was required (R. 2173), and the District Court filed an opinion memorandum in respect thereto (R. 2171) reported in 42 Fed. Supp. 677. Thereafter, on November 15, 1941, the District Court entered its order granting Maryland "a new trial alternative to its Motion for Judgment" (R. 2176), and filed an opinion memorandum sur the motion for a new trial (R. 2174), reported in 42 Fed. Supp. 678. On the same day, November 15, 1941, it entered an order vacating and setting aside the verdict in favor of the Petitioner and giving judgment for Maryland against Petitioner (R. 2177). Petitioner filed notice of appeal February 9, 1942 from the final judgment entered November 15, 1941 and stated in said notice of appeal "and further, that, in this appeal from said final judgment, plaintiff will also

seek a review and reversal *of the order* entered in this action on the same date *granting a new trial"* (R. 2181). On April 24, 1942, Maryland filed in the United States Circuit Court of Appeals for the Third Circuit a motion to dismiss that part of the appeal from the order, granting a new trial, in the alternative (R. 43a, Appendix to Appellee's Brief), and Petitioner filed answer to the motion (R. 45a).

On June 2, 1942, the Circuit Court, by Biggs, C.J., entered its order dismissing that portion of the appeal which seeks a review and reversal of the order of November 15, 1941 granting a new trial (R. 47a). Thereafter, the appeal by Petitioner from the judgment n.o.v. in favor of Maryland was argued before the United States Circuit Court of Appeals for the Third Circuit. On January 22, 1943, the Circuit Court entered its order dismissing the said appeal (R. 54a), and in connection therewith rendered an opinion by Maris, C.J., (R. 49a), reported in 132 F. (2d) 894.

Summary of Argument.

(1) Petitioner, in praying for a general review, seeks review and reversal of an order for a new trial in the alternative granted by the District Court which the Circuit Court had no jurisdiction to review (Judicial Code, Section 128) and which it would not review because the granting of a new trial is within the sound discretion of the Trial Court. This Court, for the same reason, has always refused to review new trial orders.

(2) The petition for the review and reversal of the order for a new trial in the alternative was probably not filed within the period prescribed by Rule 38 (2) of the Revised Rules of the United States Supreme Court and Section 8 of the Act of February 13, 1925, c. 229, (43 Stat. 936). The order of the Circuit Court dismissing that

portion of the appeal which seeks a review and reversal of the order granting a new trial was entered June 2, 1942 (R. 47a) and the petition for writ of certiorari herein was filed March 1, 1943.

(3) We also oppose the petition insofar as it seeks a review and reversal of the order of the Circuit Court entered January 22, 1943 dismissing the appeal from the judgment n.o.v. The Circuit Court in its opinion held that under *Montgomery Ward & Company* v. *Duncan,* 311 U. S. 243, the form of the order for a new trial in the alternative should have been phrased conditionally if "alternative in the sense of a succedaneum intended to take the place of a judgment n.o.v. only if and when that judgment should be vacated by reversal on appeal" and the Circuit Court stated that if the District Court had "inadvertently omitted the condition from the order", the District Court could still correct that order by inserting the condition. We submit that the District Court should be given an opportunity to correct its order without burdening the Supreme Court with the matter which is not presently such as to necessitate the granting of a writ of certiorari.

Argument.

(1)

Petitioner endeavors, as a part of a general review, to bring up to this Court for review an order of the District Court granting Maryland a new trial in the alternative (R. 2176). The District Court stated some of the reasons for the alternative new trial in an opinion filed November 15, 1941 (R. 2174) and reported in 42 Fed. Supp. 678. It reads, in part, as follows:

"(1) * * * the verdict was against the evidence, as it was far in excess of the cost of any repairs of the machines unless supplemented by the costs of investigation, reconstruction and redesigning. * * *

"(2) In addition to the foregoing matters it is felt that the court erred in admitting over objection or failing to strike certain testimony which affected the defendant injuriously. * * *

"* * * The manipulations, however, were such that no reasonable person could view some of them otherwise than as acts which, if performed at an election, would be criminal acts. This being so, the court should have prevented their introduction, as tending to mislead the jury as to the requirements of the contract. * * *"

Petitioner insisted before the Circuit Court, as it does here, that it was appealing from the judgment n.o.v. entered by the District Court in favor of Maryland (R. 2177) and that it claimed procedural rights in connection therewith to have reviewed the alternative order for a new trial. Petitioner's notice of appeal to the Circuit Court (R. 2181) reads in part as follows:

"* * * plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on November 15, 1941; and further, that, in this appeal from said final judgment, plaintiff will also seek a review and reversal of the order entered in this action on the same date granting a new trial."

On June 2, 1942, the Circuit Court, on motion of Maryland, entered an order dismissing that part of the appeal which sought a review and reversal of the order for a new trial (R. 47a).

In Maryland's motion for a new trial in the alternative, it assigned eighty-four reasons for a new trial (R. 2153).

The Trial Court, in its opinion, mentioned only a few of these reasons. Accordingly, if Petitioner is permitted to bring the order for a new trial before this Court on writ of certiorari, it will be necessary for this Court to review and pass upon all of the eighty-four reasons given by Maryland for the new trial in its motion before the District Court. It is the settled practice of this Court to deny certiorari where the purpose is merely to review the evidence or inferences drawn from it. *General Talking Pictures Corporation* v. *Western Electric Company, Inc.*, 304 U. S. 175; *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508.

There is nothing extraordinary or peculiar about the order for a new trial in this case. The District Court followed the rule prescribed in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243 in entering its order for a new trial.

Maryland's motion before the Circuit Court to dismiss so much of the appeal as had to do with the review of the District Court's order for a new trial was based upon jurisdictional grounds. Section 128 of the Judicial Code (28 U. S. C. A., Section 225) limits the appellate jurisdiction of the Circuit Courts to a review of final decisions and they have no jurisdiction to review interlocutory orders except in those instances (a new trial order is not one of them) statutorily prescribed in Section 129 of the Judicial Code (29 U. S. C. A., Section 227, 227(a)). Moreover, the granting of a new trial is within the sound discretion of the trial judge and his discretion is not reviewable. The Circuit Courts are all in accord in holding that a new trial order is not reviewable either because they lack jurisdiction or because a new trial is within the discretion of the trial court. *Wright* v. *Taft-Pierce Mfg. Company*, 287 Fed. 131 (C. C. A.

1st); *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463 (C. C. A. 2nd); *Dry Dock, E. B. & B. R. Co.* v. *Petkunas*, 261 Fed. 988 (C. C. A. 2nd); *Clement* v. *Wilson*, 135 Fed. 749 (C. C. A. 2nd); *Cohen* v. *Globe Indemnity Co.*, 120 F. (2d) 791 (C. C. A. 3rd); *Frank Mercantile Corporation* v. *Prudential Ins. Co.*, 115 F. (2d) 496 (C. C. A. 3rd); *Werner* v. *Zintmaster*, 77 F. (2d) 74 (C. C. A. 3rd); *Milton* v. *United States*, 120 F. (2d) 794 (C. C. A. 5th); *Sentinel Co.* v. *Dinwiddie*, 41 F. (2d) 57 (C. C. A. 7th); *Ft. Dodge Portland Cement Corporation* v. *Monk*, 276 Fed. 113 (C. C. A. 8th); *Libby, McNeill & Libby* v. *Malmskold*, 115 F. (2d) 786 (C. C. A. 9th); *Hunt* v. *United States*, 53 F. (2d) 333 (C. C. A. 10th).

Likewise, this Court has so held. *United States* v. *Socony Vacuum Oil Company, Inc.*, 310 U. S. 150, at 247; *Fairmount Glass Works* v. *Cub Fork Coal Company*, 287 U. S. 474.

Petitioner urges that the new trial order should be subject to review because it is based on an erroneous view of the law. There is no such exception to the rule. *Frank Mercantile Corporation* v. *Prudential Ins. Co.*, 115 F. (2d) 496 (C. C. A. 3rd). Furthermore, from the above quotations from the opinion of the Trial Court, it will be noticed that in addition to the law questions, the following reasons were given by the trial judge for the new trial: (1) the verdict was against the evidence, (2) the court erred in admitting over objection and failing to strike certain testimony which affected Maryland injuriously, (3) the testimony and demonstrations by expert witnesses on the machines were improperly admitted over objection of Maryland and injuriously affected its case, (4) certain requests for instructions more clearly defining the requirements of the contract were erroneously refused by the Trial

Court. To reach the conclusions he did, the trial judge weighed all the expert testimony, the non-expert testimony, the documentary proof and the law. The Trial Court observed how demonstrations on the machines were conducted, whether the machines were prepared properly, whether they were operated correctly, whether the instructions were followed and numerous other important facts. He saw the witnesses on the stand and their demeanor. He noted the effect of the testimony and demonstrations on the jury. Certainly he exercised a discretion in determining whether the erroneous admission of all this evidence injuriously affected Maryland.

Petitioner, in its effort to have this Court review the new trial order, unduly stresses the word "ordinarily" used in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, at page 254, where this Court said:

> "Should the trial judge enter judgment n. o. v. and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."

This Court cited a number of cases for the statement that a new trial "would not ordinarily be reviewable". In all the cited cases, the question was one of jurisdiction. Thus, in *United States* v. *Young*, 94 U. S. 258, a new trial had been granted after the appeal had been taken but this Court refused certiorari stating that the Court of Claims had power to grant the new trial after the appeal had been taken, and this Court had no jurisdiction of the cause until final judgment. Subsequently, in *Young* v. *United States*, 95

U. S. 641, after the new trial was held, this Court refused to review the order for a new trial. In *Phillips* v. *Negley,* 117 U. S. 665, this Court did review the new trial because it had been granted by the District Court after the term had expired and therefore the question of the District Court's jurisdiction was involved. In *Hume* v. *Bowie,* 148 U. S. 245, this Court refused to review an order granting a new trial where the trial court had jurisdiction. In *Fairmount Glass Works* v. *Cub Fork Coal Company,* 287 U. S. 474, a case relied upon by Petitioner, this Court reversed the decision of the Circuit Court which had directed a new trial and affirmed the decision of the District Court which had denied the new trial. This Court refused to review the action of the District Court notwithstanding a jury had brought in a verdict of obviously inadequate damages for breach of contract.

There is nothing extraordinary in the instant case or in the new trial order. The Trial Court as we have seen, ordered the new trial because of its errors in admitting evidence, refusing to strike, as well as errors of law in refusing to charge. Nor is the instant case extraordinary because it took over a month to try, involves a record of over 2,000 pages, or because it is a suit by a political subdivision of the Commonwealth of Pennsylvania against a bonding company. The case in fact is a very simple one. It is a suit on a surety bond for alleged failure of the principal to perform the contract. The defenses were (1) *res judicata,* because, it was alleged, the issues had been decided in an action in which Petitioner and Poole, the principal of Maryland, were parties, in a case known as *Bassett* v. *Armstrong,* 309 Pa. 296, the trial of which had taken place ten years before the trial of this action, and (2) that there had been performance of the contract by Poole.

We submit that the United States Supreme Court should not review a new trial order which a Circuit Court has refused to review because it lacked jurisdiction to do so.

(2)

Sufficient has been said under (2) of our summary of argument, pages 3, 4, *supra*, about the timeliness of the petition under the rules without the need of more extended argument.

(3)

The Circuit Court, in its opinion, held that the entry by the Trial Court of the order for a new trial in the alternative thereby vacated the order for judgment n.o.v. entered the same day.

The order entered by the Trial Court read as follows:

> "And now, to wit, November 15, 1941, upon consideration thereof, the motion of the Maryland Casualty Company, defendant, for a new trial, alternative to its motion for judgment granted as of even date hereof, is hereby granted for reasons recited in the foregoing memorandum."

We believe that the order of the Trial Court sufficiently disclosed that it was conditional because it was "alternative" to the order entered giving Maryland judgment n.o.v. Nevertheless, the Circuit Court held that the order was unconditional but realized that the Trial Court "may well have intended that its new trial order should not be effective so long as the judgment for the defendant n.o.v. remained in effect and it inadvertently omitted the condition from the order". The condition that the Circuit Court had in mind was "the entry of an order granting a new trial as an alternative in the sense of a succedaneum intended to take the place of the judgment n.o.v. only if and

when that judgment should be vacated by reversal on appeal", and the Circuit Court, in its opinion, pointed out that the Trial Court might still so condition its grant of a new trial and reinstate the judgment n.o.v. Since the decision and the order of January 22, 1943 based thereon had only to do with the form of the order for a new trial entered by the District Court, it would seem that the more expeditious and proper procedure is for one of the parties to move before the District Court for its correction of its order in accordance with the opinion of the Circuit Court when the case is remanded to the District Court, and then the case can be properly brought before the Circuit Court for a decision on the merits.

Petitioner says that delay will result unless its petition for writ of certiorari and a general review is granted. Already, more delay has occurred by its adopting this procedure than would have occurred if prompt application had been made to the District Judge for a clarification of his order and for the entry of an order which the Circuit Court of Appeals indicated should be made. Had such prompt application been made, followed immediately by an appeal, this case might already have been heard with full argument before the Circuit Court of Appeals and be well on its way to a decision.

The procedure adopted by Petitioner would eliminate review by the Circuit Court of Appeals of the instant cause on its merits and deprive this Court of the benefit of the reasoned opinion of that Court. No valid reason can be advanced in this case, either because of the nature of the case or the questions involved, why such procedure should be had. In substance, Petitioner is seeking review of the refusal of the Circuit Court of Appeals to review the alleged error in granting the new trial by asking this Court (p. 14 of its petition) to grant it "a review, on writ of certiorari

* * *", and, "further, to order full hearing and argumen upon the merits of the questions involved in said appea * * *".

We submit that the District Court should be given a opportunity to correct its order, regardless of what ou views may be on the soundness of the Circuit Court' opinion, without burdening the Supreme Court with matter that has only to do with the form of an order rathe than substance, and which is not presently such as to necessi tate the granting of a writ of certiorari.

Petitioner seeks a writ of certiorari "to order full hear ing and argument upon the merits of the questions involve in said appeal to the end that this litigation may be finall determined in this Court", notwithstanding that the Ci cuit Court has not passed upon the merits of the ques tions involved. It is the settled practice of this Court no to pass upon the merits until the Circuit Court has reviewe them.

It is needless to say that Maryland does not conced any error in the award of an alternative new trial, an particularly does not concede any error in the entry o the judgment n.o.v. The opinions of the learned Distric Judge amply vindicate the conclusions reached by him.

(4)

The petition for writ of certiorari should be denied.

Respectfully submitted,

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